



TO : The Honorable Mayor and City Commissioners

FROM : James M. Messer, City Attorney

RE : (1) Pending Arbitration of former Officers Holmes and Sgt. MacNaught

(2) Authorization to forward the Sworn Complaint of former Officer Holmes to the Florida Department of Law Enforcement

(3) Closed Attorney Client Meeting

DATE : June 15, 2017

(1) Pending Arbitration of former Officer Holmes and Sgt. MacNaught

As stated in the sworn complaint of former Officer Holmes dated May 31, 2017, the cases of terminated City of Fort Pierce police Officer Holmes and Sgt. MacNaught would appear to be headed toward an arbitration proceeding. Rather than discuss this problem at a later date, I believe it advisable to obtain guidance and concurrence from my client, the City Commission, at the earliest possible time.

The sworn complaint of former Officer Holmes has precipitated this issue.

Section 45 of the City Charter states that the City Attorney "shall act as the legal advisor to, and counselor for, the city *and* all of its officers in matters relating to their official duties..." This means that I represent two clients: the City *and* City Officers. Sometimes the interests of each client are aligned, and sometimes the interests are adverse or in conflict.

Former Officer Holmes' sworn complaint raises just such a conflict: It creates substantial risk that my duties of loyalty, confidentiality and candor would be compromised by representing both the City and its officials in the arbitration.

Thus, I am ethically forced to decline the representation at the outset. I can ensure that the interest of the City will be adequately represented by outside counsel at the arbitration; while I remain able to provide counsel to the City Commission on this or any other personnel matter springing from it.

Rule 4-1.7 of the Rules Regulating the Florida Bar, which are the rules of professionalism governing members of the Florida Bar, states that a lawyer is prohibited from representing a client if representation of one will be directly adverse to another; or there is a substantial risk that the representation of a client will be materially limited by the lawyer's responsibility to another client.

An attorney's duty of loyalty to a client is the motivating factor behind this rule and requires that an attorney decline representation in such a case. In short, I should be loyal to the City Commission, not the individuals named in the complaint.

Comments to the rule explain that "[l]oyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client." Thus, the comments to the rule state, when an impermissible conflict of interest exists "before representation is undertaken...the representation should be declined."

Here, actions of the City *and* its officers are the subject of the pending arbitration. The City has received a sworn complaint, under penalty of perjury, from former Officer Holmes which alleges serious violations by city officers in their individual capacities relating to the same incident.

Based on this sworn complaint, I am alerted at the outset that there is a substantial risk that my representation will be materially limited because of the adverse position of each client. My duty of loyalty to each client forces me to decline representation in this instance. I will be impaired from recommending an appropriate course of action to the City Commission because it may be adverse to one of the named individuals in the complaint.

This is why Rule 4-1.13, the rule governing a lawyer's representation of a city, states that a lawyer employed by a city may represent any of its directors, officers or employees, but the lawyer is subject to rule 4-1.7, the rule governing conflicts between two clients detailed above.

Similarly, my duty of confidentiality to each client prevents me from representing both. Rule 4-1.6 states that "a lawyer must not reveal information relating to representation of a client except" for a few specific situations such as to prevent a client from committing a crime, or to prevent death or substantial bodily harm to another.

If I represent both the City and its officials, information I learn during the course of preparing for the arbitration may benefit one client, while on the other hand prejudice my other clients. However, my duty of confidentiality and duty of loyalty to each client prevents me from using or revealing this information to the City Commission.

Regardless, the sworn complaint under penalty of perjury will be resolved, in some manner. There is either some truth to the allegations or Officer Holmes has committed a crime by perjuring himself.

Additionally, Rule 4-2.1 states that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” In other words, I must render truthful advice. Where a conflict exists between my clients, my duty of loyalty and confidentiality prevent me from rendering candid advice.

An analogous example of this conflict is the situation where the Attorney General of the United States cannot participate in a legal proceeding because he cannot represent both the President of the United States and the Department Heads the President appoints without an ethical conflict.

This memorandum is an effort to educate everyone on a complicated issue that we have never had to deal with before. Hopefully, this explanation will enable us to reach an expeditious resolution when I bring this matter to the attention of the City Commission meeting to be held on Monday, June 19, 2017.

RECOMMENDATION: That the City Attorney be authorized to hire outside counsel to litigate the pending arbitration only.

(2) Authorization to forward the Sworn Complaint of former Officer Holmes to the Florida Department of Law Enforcement

On a related note, yesterday I received a copy of the sworn complaint by former Officer Holmes. I have contacted the Office of Executive Investigations of the Florida Department of Law Enforcement and have been informed that they are the correct agency to resolve the issues raised in the complaint.

RECOMMENDATION: That the City Attorney be authorized to forward the sworn complaint of former Officer Holmes to the Florida Department of Law Enforcement for whatever action they deem appropriate.

(3) Closed Attorney Client Meeting

I will also be requesting a closed attorney client meeting with the City Commission in the future for settlement advice in the pending case The Haven Detox Fort Pierce, LLC v. City of Fort Pierce (16-CV-14270-KAM).

c: Nicholas C. Mimms, P.E., City Manager
Linda Cox, City Clerk